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IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 214

FORT STREET UNION DEPOT COMPANY,
Petitioner

vs.

MARGARET M. HILLEN, as Special Administratrix of the Estate of Samuel Hillen, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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SUBJECT INDEX

	PAGE
Petition for Writ of Certiorari	1-10
Jurisdiction	7
Questions Presented	5
Reasons relied on for allowance of writ	7
Statutes Involved	1
Summary Statement of matters involved	2
Brief in Support of Petition	11-16
Argument	12
Jurisdiction	11
Opinions of the Court Below	11
Specification of errors and argument	12
Statement of the Case	12

TABLE OF STATUTES CITED

PAGE

Federal Employers' Liability Act of April 22, 1908, Chapter 149, 35 Statutes at Large 65, as amended, Title 45 U. S. C. A., Sec. 51 ..... 1, 2, 5, 6, 9, 14, 15

Federal Safety Appliance Act of March 2, 1893, Chapter 196, 27 Statutes at Large 531, as amended.

(a) Sec. 2 of Chapter 196, Title 45 U. S. C. A., Sec. 2 15

(b) Sec. 4 of Chapter 196, Title 45 U. S. C. A., Sec. 4 ..... 2, 5, 8, 9, 14, 15, 16

Judicial Code, Sec. 240, as amended by Act of Feb. 13, 1925, 43 Statutes 938, Title 28 U. S. C. A. Sec. 347 ..... 7, 11

TABLE OF CASES CITED

Aetna Life Ins. Co. v. Kern-Bauer, 62 Fed. (2d) 477 .. 9

Aetna Life Ins. Co. v. Ryan, 255 Fed. 483 9

Bonner v. Texas Company, 89 Fed. (2d) 291 9

Chesapeake & Ohio R. Co. v. Martin, 283 U. S. 209 .... 7, 12

Chicago, Milwaukee & St. Paul Ry. v. Coogan, 271 U. S. 472 ..... 8, 14

Davis v. Hand, 290 Fed. 73 10

McCalmont v. Pennsylvania Co., 273 Fed. 231 10

Parker v. Gulf Refining Co., 80 Fed. (2d) 795 13

Patton v. T. & P. Ry Co., 179 U. S. 658 8

Pennsylvania R. v. Chamberlain, 288 U. S. 333 .... 7, 8, 12, 14

Rogers v. Saginaw R. Co., 187 Mich. 490 10

Southern Ry. v. Walters, 284 U. S. 190 8

St. Louis & San Francisco R. Co. v. Conarty, 238 U. S. 243 15

Wells Fargo v. Taylor, 254 U. S. 175 14

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Your petitioner, Fort Street Union Depot Company, respectfully prays that a Writ of Certiorari issue to review a decision and judgment of the United States Circuit Court of Appeals for the Sixth Circuit reached by a divided court.

I. *Statutes Involved*

The question of the applicability of the following Federal Statutes is presented:

1. The Federal Employers' Liability Act of April 22, 1908, Chapter 149, 35 Statutes at Large 65, as amended by the Act of April 5, 1910, Title 45 U. S. C. A., Sec. 51, which

gives to an employee of a "common carrier by railroad" an action for damages against the employer for injuries resulting from negligence.

2. The Federal Safety Appliance Act of March 2, 1893, Chapter 196, Sec. 4, 27 Statutes at Large 531, as amended, Title 45 U. S. C. A., Sec. 4, which provides:

> "*Grab irons or handholds for security in coupling and uncoupling cars.* Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

II. *Summary Statement of Matters Involved*

Respondent brought action in the District Court of the United States for the Eastern District of Michigan, Southern Division, on May 10, 1939, alleging an action under the Federal Employers' Liability Act and claiming a violation of the Federal Safety Appliance Act (R. 1). The declaration filed by respondent alleged that on February 2, 1939, while the deceased was riding upon a car, he was struck by a broken, defective and protruding grab-iron on a car which the declaration claims was being moved on an adjacent track (R. 4).

The case was tried before a jury April 23, 1940, and the jury, after the court had denied petitioner's motion to direct the verdict, found in favor of the respondent in the sum of $22,000 (R. 162). Motion for judgment non obstante veredicto was filed May 1, 1940 (R. 163), denied on May 17, 1940 (R. 165), and judgment on the verdict entered on that date (R. 166). Appeal was duly taken to the Circuit Court of Appeals for the Sixth Circuit where a divided

court, with Judge Xenophon Hicks dissenting, affirmed the judgment of the District Court on April 16, 1941 (R. 174). Petition for rehearing was filed with the said Circuit Court of Appeals on May 14, 1941 (R. 185), and was denied on May 15, 1941 (R. 199).

No testimony was offered at the trial by respondent that a car was being moved with a defective grab-iron as alleged in the declaration, and no testimony was offered at the trial by respondent that there was a defective grab-iron on any car prior to the accident. If respondent's claims are true, decedent, while he was unnecessarily riding the side of a car into a place of close clearance (R. 80, 120), struck against a grab-iron which was on a passenger car standing stored on an adjoining track. He was knocked to the ground with a broken hip, taken to the hospital, and there died a month later of pneumonia. Respondent claims that the deceased stated to one of the witnesses who gathered at the scene after the accident that he was riding on the side of a car, struck against a grab-iron, and got knocked off (R. 25). This was the only testimony offered by respondent to show the manner in which the decedent was injured and was received in evidence by the trial judge as part of the res gestae.

The positive and undisputed testimony offered by petitioner established that the grab-iron on the standing car was in proper position and condition up to the moment of the accident (R. 106, 109); that immediately after the accident it was found that the bolts holding the lower end had been newly sheared off (R. 87) and the lower end of the grab-iron pushed forward in the direction the deceased was riding and turned into the vestibule of the car (R. 81); that one of the bolts which held the grab-iron was found freshly broken upon the ground (R. 114); and that petitioner's yard master immediately after the accident straightened the grab-iron temporarily pending repairs (R. 81).

Sometime after the accident and after the grab-iron had been temporarily straightened by petitioner's yard master, a witness who was called by respondent observed the grab-iron and he testified that it then protruded from the car four or five inches and slightly to the east (R. 30-31). The Circuit Court of Appeals, with Judge Allen and Judge Martin concurring (R. 174) and with Judge Hicks dissenting (R. 181), held that the testimony of this witness was admissible as proof that the grab-iron was defective before the accident and that the jury had the right to disbelieve the undisputed testimony of the yard master and the undisputed testimony of petitioner's witnesses that the grab-iron was in good condition immediately prior to the accident.

Respondent offered at the trial by way of rebuttal, and which was received by the trial judge over the objection of petitioner's counsel, the testimony of a so-called expert who on the showing that he was a metallurgist was permitted to say that in his opinion decedent's body striking against the grab-iron would not shear the bolts which held it (R. 126). The witness had the bolt in his possession for only five minutes, he said, and made no test of its tensile strength or structure (R. 127), and the hypothetical question which formed the basis of his answer omitted important facts and included unproved facts, and, as pointed out by Judge Hicks in his dissenting opinion (R. 182), the answer of the witness was allowed to give rise to an inference that decedent's body did not shear the bolts, in the face of the obvious fact that decedent's body did shear the bolts.

In the course of his work, decedent, if he was where he should have been, had only to bring a string of cars to a stop by turning a valve on the end of an air hose. The train was moving four to five miles an hour, and he could have done this by walking along a cement platform, a place

of absolute safety, or he could have ridden in the vestibule of the car, likewise a place of safety (R. 79, 80). Instead, if respondent's claims are true, decedent, weighing approximately 260 pounds (R. 80), rode between two cars which afforded a clearance of only 16 inches (R. 120), thus unnecessarily taking an extremely dangerous way in which to perform his work when an absolutely safe way was open to him.

Petitioner is a depot company and not a terminal railroad and acts as a landlord of three railroad companies which enter its depot, and, by agreement with the three tenant railroad companies, makes up and breaks up trains and cleans and services their equipment (R. 32, 33). The Circuit Court of Appeals held that the depot company was a common carrier within the provisions of the Federal Employers' Liability Act and that decedent, although not engaged in the handling of the grab-iron on the standing passenger car, or with the car itself, was nevertheless within the provisions of Section 4 of the Safety Appliance Act and, since the jury held that the Safety Appliance Act had been violated, respondent was entitled to recover without proof of negligence.

III. *Questions Presented*

1. May Section 4 of the Safety Appliance Act, Title 45, U. S. C. A. Sec. 4, be extended so as to bring within its provisions employees who were not engaged in making any use of the appliance or of the car upon which it was contained and permit recovery for injuries without proof of negligence?

2. Is a depot company, which is not a terminal railroad company and which performs no services as a common carrier, nevertheless a common carrier within the meaning

of the Federal Employers' Liability Act, Title 45, U. S. C. A., Section 51?

3. Where the testimony of credible and unimpeached witnesses is undisputed, may the jury be permitted to disregard the testimony and by surmise and conjecture assume the existence of facts favorable to its decision?

4. May the Circuit Court of Appeals arbitrarily disregard undisputed, credible, and unimpeached testimony and assume the existence of facts which did not and could not exist to reach its decision?

5. May a Circuit Court of Appeals disregard a ground of appeal and decline to pass upon it when its decision is against the appellant?

6. Is testimony admissible as res gestae when the circumstances relied on to make it admissible are not proved but are themselves presumed?

7. Will an inference which it is claimed arises from the testimony of a witness presented as an expert, given in response to a question which omitted necessary and important facts, and which included unproved facts, negative an obvious and established fact?

8. Does a trial court err in submitting a question to a jury the decision of which must rest upon guess, speculation and conjecture?

9. Where an employee unnecessarily adopts an extremely dangerous method of performing his work when an absolutely safe method is open to him and he receives injuries through an accident which would not have occurred had he employed the safe method, is his own negligence the proximate cause of his injuries?

IV. *Jurisdiction*

The jurisdiction of this court is based on the Judicial Code, Sec. 240 as amended by the Act of February 13, 1925, 43 Statutes 938, Title 28 U. S. C. A., Sec. 347.

The date of the judgment of the Circuit Court of Appeals of the Sixth Circuit sought to be reviewed is April 16, 1941. Petition for rehearing was denied on May 15, 1941 (R. 199). This petition for a writ of certriorari is filed within three months from the date of the judgment of the Circuit Court of Appeals.

V. *Reasons Relied on for the Allowance of the Writ*

1. The Circuit Court of Appeals by its majority decision held that the jury had the right to disbelieve the undisputed, uncontradicted, credible and unimpeached testimony of petitioner's witnesses. This holding is in conflict with the applicable decisions of this court and in conflict with the accepted and established course of judicial procedure. The court should have held that the trial judge and jury were bound by testimony which is undisputed, uncontradicted, credible and unimpeached, and unless this court takes jurisdiction, the decision of the Circuit Court of Appeals sanctions future rulings of the trial judge that juries may disbelieve such testimony.

Pa. R. Co. v. Chamberlain, 288 U. S. 333, 340-341,

C. & O. v. Martin, 283 U. S. 209.

2. In the trial court, petitioner, by motion to direct and by request to charge, and by motion for judgment non obstante veredicto, requested judgment for petitioner on the ground that there was no question which could be submitted to the jury except that which called for guess, speculation and conjecture. The Circuit Court of Appeals

declined to consider this ground for reversal. Petitioner submits that it was entitled to have this ground for reversal considered by the Circuit Court of Appeals. The court not only refused to consider this question, but the judges joining in the majority opinion, themselves indulged in speculation, surmise, guess and conjecture in assuming facts which did not exist.

3. At the conclusion of the proofs, the record was in such plight that there was no question which could have been submitted to the jury except which called for guess, speculation and conjecture, and petitioner was for this reason entitled to a direction of the verdict.

The Circuit Court of Appeals erred in failing to reverse the case on the ground that testimony which rests on guess, speculation and conjecture will not be allowed to stand against uncontradicted and unimpeached positive testimony.

Southern Railway v. Walters, 284 U. S. 190;

Pennsylvania Ry. v. Chamberlain, 288 U. S. 333;

C. M. & St. P. Ry. v. Coogan, 271 U. S. 472;

Patton v. T. & P. Ry. Co., 179 U. S. 658, 663.

4. In its majority opinion, the Circuit Court of Appeals, in holding that a plaintiff, in order to recover for injuries alleged to have been sustained as a result of a violation of the Safety Appliance Act, need prove merely that at some indefinite time after the accident there was a defective appliance, relieved the plaintiff from the burden of proof and placed such onus upon the defendant, and has thereby so far departed from the usual course of judicial proceedings and by its decision sanctioned such departure in the future on the part of trial courts in the Sixth Circuit as to call for the exercise by this court of its power of supervision.

5. Locally the State trial courts have held the Fort Street Union Depot Company to be not a common carrier. The holding of the Circuit Court of Appeals that a depot company, although not a terminal railroad, which does not operate a railroad as a means of carrying for the public, does not transport either persons or property by railroad or engage in rail transportation as a common or public calling, is nevertheless a common carrier by railroad within the meaning of the Federal Employers' Liability Act, presents an important question of Federal law which has not been, but which should be, settled by this court.

6. The holding of the Circuit Court of Appeals that decedent was within the class of employees designed to be protected by Section 4 of the Safety Appliance Act, even though he was making no use of the grab-iron in any way whatsoever, presents a question of Federal law of the utmost importance, because if the holding is correct, its effect is to extend Section 4 of the Safety Appliance Act so as to bring within its provisions a new and different class of employees. This court has not decided the question.

7. The holding that the testimony offered by respondent as res gestate was admissible, although based on circumstances which were presumed, and without proof of time or spontaneity, is in conflict with the decisions of other Circuit Courts of Appeal

Aetna Life Ins. Co. v. Kern-Bauer, 62 Fed. (2d) 477 (C. C. A. 10th);

Aetna Life Ins. Co. v. Ryan, 255 Fed. 483 (C. C. A. 2nd);

Bonner v. Texas Co., 89 Fed. (2d) 291 (C. C. A. 5th);

and in conflict with the decision of the highest court in the State of Michigan,

Rogers v. Saginaw R. Co., 187 Mich. 490.

8. The power of supervision of this court should be exercised to review the refusal of the Circuit Court of Appeals to hold that the proximate cause of decedent's injuries was his own negligence in adopting the extremely dangerous method of stopping the train while riding on the side of a car and into a place of very narrow clearance when the convenient and safe method was open to him of placing himself in the vestibule of the car or walking along the cement platform with the air hose in his hand.

Davis v. Hand, 290 Fed. 73;

McCalmont v. Pa. Co., 273 Fed. 231.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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